

BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
WILLIAM A. MUNDELL
Commissioner
MARC SPITZER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner

2006 APR 21 A 11:21

AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF THE FORMAL
COMPLAINT OF PAC-WEST TELECOMM
SEEKING ENFORCEMENT OF THE
INTERCONNECTION AGREEMENT
BETWEEN PAC-WEST TELECOMM AND
QWEST CORPORATION

) DOCKET NO. T-01051B-05-0495
) T-03693A-05-0495
)
) **RESPONSE OF PAC-WEST**
) **TELECOMM TO QWEST**
) **CORPORATION'S MOTION FOR**
) **AN ORDER SUSPENDING THE**
) **RECOMMENDED OPINION AND**
) **ORDER**
)

I. Introduction

Pac-West Telecomm adamantly opposes Qwest's Motion for an Order Suspending the Recommended Opinion and Order ("Motion") in this matter. Qwest's eleventh-hour Motion is yet another attempt by Qwest to avoid payment and should be denied.

In two separate proceedings, two independent decision makers have concluded that Qwest is obligated to compensate Pac-West under the terms of the Interconnection Agreement (ICA) between the two companies.. The first – an arbitrator retained jointly by Qwest and Pac-West – concluded on December 2, 2004, that the ICA required Qwest to compensate Pac-West for ISP-bound traffic. When Qwest refused to pay the majority

of the funds owed, Pac-West was compelled to incur the cost of petitioning the Commission for relief. Now, after persisting in its refusal to pay Pac-West for more than two years, Qwest is making a bid to delay payment still further. Sixteen months of unjustified delay is enough. The Commission should deny Qwest's motion and consider the ROO at the May 2/3 open meeting.

II. Argument

Qwest's bid for a further delay is based on the notion that the Commission would be aided by additional briefing regarding the First Circuit's decision in *Global NAPs v. Verizon New England*, 2006 WL 924035 (1st. Cir., April 11, 2006) ("*Global NAPs*"). Qwest's Motion fails for three reasons.

First, as recognized by the Administrative Law Judge, this case hinges on the Arizona ICA between Pac-West and Qwest, and the language of that contract is unique to this case. The contract between Qwest and Pac-West is nothing like language proposed for inclusion in an ICA in the *Global NPAs* matter. Significantly, the ROO in this case orders Qwest to compensate Pac-West *based on the language of the ICA* (as amended) and not based on a broader policy conclusion regarding the general compensability of VNXX traffic:

The plain language of the ISP Amendment provides for reciprocal compensation for all ISP-bound traffic. Because it does not exclude VNXX ISP-bound traffic, we find that such traffic should be subject to reciprocal compensation under the terms of the ICA and ISP Amendment.

...

Our finding in the matter before us is premised on the language of the ICA and ISP Amendment and the holding in the ISP Remand Order, and makes

no findings concerning the appropriateness of VNXX arrangements on a going-forward basis.

Recommended Order and Opinion ("ROO"), paras. 21 & 24. Qwest has had ample opportunity, in two independent proceedings, to brief its position on the contract language in this case. Additional briefing on the general compensability of VNXX traffic will not be helpful to the Commission.

Second, additional briefing is inappropriate here, because the Administrative Law Judge has wisely recommended a generic docket on the issue of VNXX traffic. All general briefing on VNXX policies and compensation belong in that docket, including Qwest's proposed briefing on *Global NAPs*. As stated in the ROO:

Because the issue of VNXX traffic has now come before the Commission more than once, and we anticipate that it will continue to be an issue in the future, we will order staff to open a generic docket to investigate and make recommendations on whether, or under what circumstances, the use of VNXX is in the public interest.

ROO para. 24. To the extent the Commission is inclined to make general policy decisions concerning VNXX traffic, all providers should be granted notice and the opportunity to participate in the proceeding. The ROO appropriately provides just such an opportunity.

Third, *Global NAPs* is not a "critical new development" in the law, as Qwest contends. The parties have collectively filed ten notices of supplemental authority in this proceeding, all of which bear on the general issue of VNXX traffic. *Global NAPs* is just one of those decisions, and has no precedential force in Arizona, which is located within the U.S. Court of Appeals for the Ninth Circuit. Moreover, *Global NAPs* arises out of an

arbitration before the Massachusetts Department of Telecommunications and Energy, and holds that "the FCC did not expressly preempt state regulation of intercarrier compensation for non-local ISP-bound calls." *Global NAPs* p. 4. *Global NAPs* does not reinterpret the ISP Remand Order or create new law regarding VNXX traffic. At most, it tells us that states located within the First Circuit have authority to resolve intercarrier compensation disputes. The decision does not apply in the Ninth Circuit, even if it did, it would mean no more than that the Commission has authority to do exactly what it has done in this case, namely, to declare that Pac-West is contractually entitled to inter carrier compensation from Qwest under the ICA.

Qwest's failure to follow the change of law provision in the Qwest/Pac-West ICA is clear evidence that *Global NAPs* does not change the law in this jurisdiction. The ICA permits either party to initiate a change to the ICA based on a change in the law (ICA Section 24.3 (Exhibit 1)), and Qwest has correctly not initiated this process. Qwest's decision may stem from the fact that an opinion from the U.S. Court of Appeals for the First Circuit is not controlling precedent in the District of Arizona and therefore is not grounds for a new contractual provision in an Arizona ICA, and more importantly, the opinion does nothing to change the Qwest/Pac-West ICA. This is all the more reason to deny Qwest's bid to make an end-run around the change-in-law provision in the ICA.

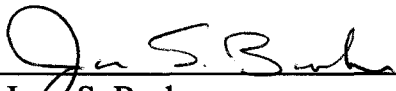
III. Conclusion

Qwest's delaying tactics thus far have compelled Pac-West for more than two years to terminate traffic for Qwest customers without compensation. Qwest now seeks additional delay. Pac-West respectfully requests that the Commission deny Qwest's

motion as untimely and groundless and proceed with considering the ROO at open meeting on May 2/3, 2006.

Respectfully submitted this 21st day of April, 2006.

OSBORN MALEDON PA

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**AGREEMENT
FOR LOCAL WIRELINE NETWORK INTERCONNECTION
AND
SERVICE RESALE**

**Between
Pac-West Telecomm, Inc.
and
U S WEST Communications, Inc.**

**For the State of
Arizona**

**Agreement Number
CDS-990507-0126**

- 23.2 U S WEST shall provide Pac-West a summary describing the proposed change(s) to each Telecommunications Service which is available pursuant to this Agreement. U S WEST shall also provide Pac-West a summary describing the proposed change(s) of each intrastate and interstate tariff which provides for an Interconnection, unbundled Network Element or Ancillary Service that is available pursuant to this Agreement. Such summaries shall be available through an internet Web page to be posted on the same day the proposed change is filed with the Commission or the FCC or at least thirty (30) days in advance of its effective date, whichever is earlier.
- 23.3 In the event any governmental authority or agency orders U S WEST to provide any service covered by this Agreement in accordance with any terms or conditions that individually differ from one or more corresponding terms or conditions of this Agreement, Pac-West may elect to amend this Agreement to reflect any such differing terms or conditions contained in such decision or order, with effect from the date Pac-West makes such election. The other services covered by this Agreement and not covered by such decision or order shall remain unaffected and shall remain in full force and effect.
- 23.4 The Parties intend that any additional services requested by either Party relating to the subject matter of this Agreement will be incorporated into this Agreement by amendment.

24. Compliance

- 24.1 Each Party shall comply with all applicable federal, state, and local laws, rules and regulations applicable to its performance under this Agreement.
- 24.2 Each Party represents and warrants that any equipment, facilities or services provided to the other Party under this Agreement comply with the Communications Law Enforcement Act of 1994 ("CALEA"). Each Party (the "Indemnifying Party") shall indemnify and hold the other Party (the "Indemnified Party") harmless from any and all penalties imposed upon the Indemnified Party for such noncompliance and shall, at the Indemnifying Party's sole cost and expense, modify or replace any equipment, facilities or services provided to the Indemnified Party under this Agreement to ensure that such equipment, facilities and services fully comply with CALEA.
- 24.3 All terms, conditions and operations under this Agreement shall be performed in accordance with all applicable laws, regulations and judicial or regulatory decisions of all duly constituted governmental authorities with appropriate jurisdiction, and this Agreement shall be implemented consistent with the FCC Interconnection Order and any applicable Commission orders. Each Party shall be responsible for obtaining and keeping in effect all FCC, Commission, franchise authority and other regulatory approvals that may be required in connection with the performance of its obligations under this Agreement. In the event the Act or FCC or Commission rules and regulations applicable to this Agreement are held invalid, this Agreement shall survive, and the Parties shall promptly renegotiate any provisions of this Agreement which, in the absence of such invalidated Act, rule or regulation, are insufficiently clear to be effectuated, violate, or are either required or not required by the new rule or regulation. During these negotiations, each Party will continue to provide the same services and elements to each other as are provided for under this Agreement. Provided, however, that either Party shall give ten (10) Business Days notice if it intends to cease any development of any new element or service that is not at that time being provided pursuant to this Agreement. In the event the Parties cannot agree on an amendment within thirty (30) days from the date any such rules, regulations or orders become effective, then the Parties shall resolve their dispute, including liability for non-compliance with the new clause or the cost, if any, of performing activities no longer required by the rule or regulation during the renegotiation of the new clause under the applicable procedures set forth in Section 27 herein.